

149 Fed.Appx. 189, 2005 WL 2333655 (C.A.4 (Md.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 149 Fed.Appx. 189, 2005 WL 2333655 (C.A.4 (Md.)))

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)

United States Court of Appeals,
Fourth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Jacques WALKER, Defendant-Appellant.
No. 04-4234.

Submitted: Aug. 19, 2005.
Decided: Sept. 23, 2005.

Background: Defendant was convicted in the United States District Court for the District of Maryland, Catherine C. Blake, J., of being a felon in possession of a firearm, possession with intent to distribute marijuana, and possession of a firearm in furtherance of a drug trafficking crime. Defendant appealed.

Holdings: The Court of Appeals held that:
(1) evidence seized from defendant in search incident to arrest and his voluntary statement regarding firearm were admissible at trial;

(2) evidence supported convictions for possession with intent to distribute marijuana and possession of firearm in furtherance of a drug trafficking crime;
(3) flight instruction was warranted given evidence that defendant attempted to elude police;
(4) jury instruction that listed examples of how a firearm might be used in furtherance of a drug trafficking crime was proper;
(5) Congress had authority to enact felon in possession statute; and
(6) sentence enhancement under career offender guidelines did not violate the Sixth Amendment.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚡ 394.4(9)

110 Criminal Law

110XVII Evidence

110XVII(I) Competency in General

110k394 Evidence Wrongfully Obtained

110k394.4 Unlawful Search or Seizure

110k394.4(9) k. Arrest or Stop, Search
Incidental To; Validity of Stop or Arrest. Most Cited
Cases

Criminal Law 110 ⚡ 412.1(3)

110 Criminal Law

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110XVII Evidence

110XVII(M) Declarations

110k411 Declarations by Accused

110k412.1 Voluntary Character of Statement

110k412.1(3) k. Illegality of Detention.

Most Cited Cases

Since arresting officers had probable cause to believe defendant had just committed a crime, evidence seized from defendant in search incident to arrest and defendant's spontaneous, voluntary statement regarding a firearm he possessed were admissible at trial for possession with intent to distribute marijuana, being a felon in possession of a firearm, and possession of a firearm in furtherance of a drug trafficking crime. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. §§ 922(g), 924(c); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a), 21 U.S.C.A. § 841(a).

[2] Controlled Substances 96H ⚡81

96H Controlled Substances

96HIII Prosecutions

96Hk70 Weight and Sufficiency of Evidence

96Hk81 k. Possession for Sale or Distribution.

Most Cited Cases

Evidence that police officers witnessed defendant engaging in acts consistent with a street-level drug transaction immediately prior to his arrest supported conviction for possession with intent to distribute marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a), 21 U.S.C.A. § 841(a).

[3] Weapons 406 ⚡17(4)

406 Weapons

406k17 Criminal Prosecutions

406k17(4) k. Weight and Sufficiency of Evidence.

Most Cited Cases

Significant evidence beyond mere presence of firearm at scene of street-level drug transaction supported conviction for possession of a firearm in furtherance of a drug trafficking crime. 18 U.S.C.A. § 924(c).

[4] Criminal Law 110 ⚡778(11)

110 Criminal Law

110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k778 Presumptions and Burden of Proof

110k778(11) k. Flight or Surrender. Most

Cited Cases

Flight instruction was warranted at trial for drug and weapons offenses, given evidence that defendant attempted to elude police.

[5] Weapons 406 ⚡17(6)

406 Weapons

406k17 Criminal Prosecutions

406k17(6) k. Instructions. Most Cited Cases

Jury instruction at trial for drug and weapons offenses, which listed examples of how a firearm might be used in furtherance of a drug trafficking crime, was proper. 18 U.S.C.A. § 924(c).

[6] Commerce 83 ⚡82.50

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[8] Jury 230 ⚡21.4

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(K) Miscellaneous Subjects and Regulations

83k82.50 k. Weapons and Explosives. **Most Cited Cases**

Weapons 406 ⚡3

406 Weapons

406k3 k. Constitutional, Statutory, and Local Regulations. **Most Cited Cases**

Congress had authority under Commerce Clause to enact felon in possession statute. U.S.C.A. Const. Art. I, § 8, cl. 3; 18 U.S.C.A. § 922(g).

230 Jury

230II Right to Trial by Jury

230k20 Criminal Prosecutions

230k21.4 k. Habitual Criminals. **Most Cited Cases**

Sentence for possession with intent to distribute marijuana, possession of a firearm in furtherance of a drug trafficking crime, and being a felon in possession of a firearm that was enhanced under the career offender guidelines did not violate the Sixth Amendment, since it was based solely upon prior convictions that on their face qualified as controlled substance offenses. U.S.C.A. Const. Amend. 6; 18 U.S.C.A. §§ 922(g), 924(c); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a), 21 U.S.C.A. § 841(a); U.S.S.G. § 4B1.1, 18 U.S.C.A.App.

[7] Criminal Law 110 ⚡1042.3(3)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1042.3 Sentencing and Punishment

110k1042.3(3) k. Right to Jury Determination. **Most Cited Cases**

(Formerly 110k1035(1))

Sentencing issues under Blakely and Booker that were raised for first time on appeal would be reviewed for plain error.

[9] Criminal Law 110 ⚡1042.3(1)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1042.3 Sentencing and Punishment

110k1042.3(1) k. In General. **Most Cited Cases**

(Formerly 110k1042)

District court's mandatory application of sentencing guidelines was not plain error, since it did not affect defendant's substantial rights. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

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***190** Appeal from the United States District Court for the District of Maryland, at Baltimore. Catherine C. Blake, District Judge. (CR-03-238-CCB). David W. Lease, Smith, Lease & Goldstein, L.L.C., Rockville, Maryland, for Appellant. Thomas M. DiBiagio, United States Attorney, Michael J. Leotta, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Before TRAXLER and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

***191** Affirmed by unpublished PER CURIAM opinion. Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).PER CURIAM:

****1** Jacques Walker appeals his total 360-month sentence following a jury trial for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g), possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a), and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c). We affirm his convictions and sentence.

Walker challenges his convictions on several grounds and challenges his sentence under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). He argues: (1) the district court erred in denying his motion to suppress evidence; (2) insufficiency of the evidence regarding the possession with intent to distribute marijuana count; (3) insufficiency of the evidence regarding the § 924(c) count; (4) the district court erred in giving a flight instruction to the jury when there was no evidence of Walker's flight; (5) the district court improperly gave examples in a jury instruction of how a

firearm may be used in furtherance of a drug trafficking crime under § 924(c) when some examples were not supported by the evidence; (6) Congress lacked the constitutional authority to enact the felon in possession statute, § 922(g), under the Commerce Clause; and (7) his sentence violated the Sixth Amendment under Blakely because it was enhanced based on judicial findings of prior convictions and because the guidelines are unconstitutional. After United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), issued, Walker filed two letters under Fed. R.App. P. 28(j) asserting his sentence was in violation of Booker and later asserting his enhancements for prior convictions were in violation of Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), and United States v. Washington, 404 F.3d 834 (4th Cir.2005). The Government rejects Walker's challenges to his convictions and sentence. Regarding Walker's Blakely and Booker arguments, the Government argues the district court did not plainly err in sentencing Walker because the only judicial enhancements were based upon prior convictions.

[1] We reject Walker's challenges to his convictions. First, in looking at the totality of the circumstances, Illinois v. Gates, 462 U.S. 213, 230-32, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), we find the arresting officers had probable cause to believe Walker had just committed a crime. Cf. United States v. Al-Talib, 55 F.3d 923, 931 (4th Cir.1995) (ruling that police surveillance will support a finding of probable cause where officers observe conduct that is consistent with a drug transaction). Therefore, the evidence seized in a search of Walker incident to his arrest and Walker's spontaneous, voluntary statement regarding a firearm he possessed were admissible under the Fourth Amendment.

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[2][3] Next, taking the evidence in the light most favorable to the Government, we find substantial evidence supported the jury verdicts both on the possession of marijuana with intent to distribute and on the possession of firearm in furtherance of a drug trafficking crime counts. *See Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942) (stating standard of review). With regard to the intent to distribute element of a § 841(a) violation, we note evidence revealed officers witnessed Walker engaging in acts consistent with a street-level drug transaction immediately prior to Walker's arrest. *192 Regarding the § 924(c) conviction, we find there was significant evidence, substantially more than mere presence of the firearm at the scene, to support the jury's verdict that Walker possessed a firearm in furtherance of a drug trafficking crime. *See United States v. Lomax*, 293 F.3d 701, 705 (4th Cir.2002).

**2 [4] Further, we find that the district court properly gave a flight instruction to the jury because there was evidence of Walker's attempt to elude police once he believed police were present. *Cf. United States v. Obi*, 239 F.3d 662, 665 (4th Cir.2001) (recognizing that consciousness of guilt may be inferred from evidence of flight).

[5] We further find the district court's jury instruction regarding the § 924(c) count, which in part listed examples of how a firearm might be used in furtherance of a drug trafficking crime, was proper. *United States v. Lomax*, 293 F.3d 701, 705 (4th Cir.2002).

[6] We also reject Walker's challenge to his felon in possession conviction on the ground that Congress lacked the authority to enact the statute under the Commerce

Clause. It is well-established that the statute, which expressly requires an interstate commerce nexus, is a valid congressional enactment under the Commerce Clause. *United States v. Quarles*, 330 F.3d 650, 651 n. 2 (4th Cir.), cert. denied, 540 U.S. 977, 124 S.Ct. 459, 157 L.Ed.2d 331 (2003); *United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir.2001); *United States v. Nathan*, 202 F.3d 230, 234 (4th Cir.2000).

[7][8] Finally, we review Walker's challenges to his sentence. Because the issues under *Blakely* and *Booker* are raised for the first time on appeal, review is for plain error. *See United States v. Hughes*, 401 F.3d 540, 547 (4th Cir.2005). We find no Sixth Amendment error in Walker's sentencing. Walker's sentence was enhanced under the career offender guidelines, USSG § 4B1.1, based solely upon his prior convictions. In both *Blakely* and *Booker*, the Supreme Court reaffirmed its holding in *Almendarez-Torres v. United States*, 523 U.S. 224, 244, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), that the fact of a prior conviction need not be proven to a jury beyond a reasonable doubt. *Booker*, 125 S.Ct. at 756; *Blakely*, 542 U.S. at ---, 124 S.Ct. at 2536. Walker does not dispute the fact of his prior convictions. We conclude the predicates for designating Walker as a career offender were satisfied because he has two prior convictions that on their face qualify as "controlled substance offenses" under USSG § 4B1.1. *See USSG § 4B1.2* (defining predicate offenses).

[9] Next, we turn to whether the district court's mandatory application of the guidelines constituted plain error. We find Walker has not established that the error in treating the guidelines as mandatory affected his substantial rights. *See United States v. White*, 405 F.3d 208, 215-25 (4th Cir.2005). For these reasons, we affirm Walker's convictions and sentence.

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We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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